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8 UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF OREGON

10 IN RE)
11 MARK JEFFERY STOIBER,) Case No. 07-61157-fra7
12 Debtor.)
13 MARK JEFFERY STOIBER,)
14 Plaintiff,) Adv. Proc. No. 08-6052-fra
15 vs.)
16 CRAIG S. GALPERN,)
17 Defendant.) MEMORANDUM OPINION
18

19 Plaintiff, the Debtor herein, filed a document entitled
20 "Chapter 7 Order RE: Debtor(s) Motion and Order to Show Cause Re:
21 Contempt," which seeks damages for violation of the automatic
22 stay and for violation of the Fair Debt Collection Practices Act
23 (FDCPA). It was interpreted by the Court as a complaint seeking
24 a money judgment and gave rise to this adversary proceeding.
25 Defendant filed a motion for summary judgment to which the
26 Plaintiff filed a response. As neither party asked for a

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1 hearing, and the Court does not find one to be warranted, the
2 matter will be decided on the present record without oral
3 argument. For the reasons that follow, Defendant's motion for
4 summary judgment will be granted.

5 BACKGROUND

6 Debtor's Bankruptcy

7 Debtor filed bankruptcy under chapter 7 on April 30, 2007.
8 On February 25, 2008, the Debtor filed a "Notice of Amended
9 Schedules and Amended Schedule(s) Matrix." On March 6, 2008, an
10 Order of Discharge was entered and the case was closed. On March
11 17, 2008, the Debtor filed a Motion to Reopen Chapter 7 Case and
12 filed a complaint against the Defendant on March 17, 2008. On
13 March 26, 2008, the Debtor filed a complaint against the
14 Defendant's client (and creditor of the Debtor), Leisa Preboski
15 ("Preboski").

16 Complaint

17 The Plaintiff filed an affidavit with his Complaint in which
18 he alleges that the Defendant sought to recover debts which were
19 subject to discharge in violation of the automatic stay, by
20 filing legal action in the Circuit Court of the State of Oregon
21 for Jackson County.¹ He seeks punitive damages and attorney fees
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24 ¹ Defendant's client, Leisa Preboski, fka Leisa Stoiber, filed a motion
25 in state court asking the court to find the Plaintiff in contempt for 1)
26 interfering with the rights allocated to Preboski as custodial parent, 2)
failing to pay attorney fees previously awarded to her, and 3) failing to
provide insurance information.

1 for violation of the automatic stay of 11 U.S.C. § 362(a)²(by way
2 of civil contempt rather than the statutory remedy under §
3 362(k)(1))and "Maximum Civil Penalties" under 15 U.S.C. § 1692
4 (the FDCPA). Violation of the FDCPA appears to be predicated
5 entirely on the allegation of Defendant's willful violation of
6 the automatic stay.

7 SUMMARY JUDGMENT

8 Summary judgment is appropriate when the pleadings,
9 depositions, answers to interrogatories, admissions, and
10 affidavits, if any, show that there is no genuine issue of
11 material fact and the moving party is entitled to judgment as a
12 matter of law. Fed. R. Civ. P. 56, made applicable by Fed. R.
13 Bankr. P. 7056. The movant has the burden of establishing that
14 there is no genuine issue of material fact. Celotex Corp. v.
15 Catrett, 477 U.S. 317, 323 (1986). The court must view the facts
16 and draw all inferences in the light most favorable to the
17 nonmoving party. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors
18 Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). The primary inquiry
19 is whether the evidence presents a sufficient disagreement to
20 require a trial, or whether it is so one-sided that one party
21 must prevail as a matter of law. Anderson v. Liberty Lobby,
22 Inc., 477 U.S. 242, 247 (1986).

23 A party opposing a properly supported motion for summary
24 judgment must present affirmative evidence of a disputed material

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26 ² All section references are to the Bankruptcy Code, 11 U.S.C. §§ 101
et. seq. in effect at August 11, 2005, unless the context otherwise indicates.

1 fact from which a factfinder might return a verdict in its favor.
2 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).
3 Federal Rule of Bankruptcy Procedure 7056, which incorporates
4 Federal Rule of Civil Procedure 56(e), provides that the
5 nonmoving party may not rest upon mere allegations or denials in
6 the pleadings, but must respond with specific facts showing there
7 is a genuine issue of material fact for trial. Absent such
8 response, summary judgment shall be granted if appropriate. See
9 Celotex Corp. v. Catrett, 477 U.S. 317, 326-27 (1986).

10 CIVIL CONTEMPT

11 Bankruptcy courts have the inherent power to sanction under
12 Code § 105, but do not have the authority to impose significant
13 punitive sanctions. In re Rainbow Magazine, Inc., 77 F.3d 278
14 (9th Cir. 1996); In re Thomas Dyer, 322 F.3d 1178 (9th Cir.
15 2003). Caselaw involving civil sanctions imposed on a creditor
16 for violating the discharge injunction of Code § 524 is relevant
17 in a case involving an alleged violation of the automatic stay.
18 To assess sanctions for violation of the discharge injunction,
19 the moving party must prove that the creditor "(1) knew the
20 discharge injunction was applicable and (2) intended the actions
21 which violated the injunction." Zilog, Inc. v. Corning et al. (In
22 re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006)(citing In re
23 Hardy, 97 F.3d 1384, 1390 (11th Cir. 1996)).

24 DISCUSSION AND ANALYSIS

25 Defendant's motion for summary judgment is based on two
26 arguments: (1) That this court does not have subject matter

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1 jurisdiction, and (2) That the Defendant did not knowingly
2 violate the automatic stay. While no evidence has been presented
3 specifically showing that Preboski's claim for attorney fees was
4 subject to the automatic stay, it appears that Defendant does not
5 contest that fact and the Court will accept it as true.

6 A. Subject Matter Jurisdiction

7 Defendant states that it brought the action in state court
8 against the Plaintiff and the Plaintiff failed to remove it to
9 the Bankruptcy Court. Citing In re Jeffries, 191 B.R. 861
10 (Bankr. D. Or. 1995), an opinion from this Court, Defendant then
11 argues that jurisdiction over the matter is concurrent between
12 the state and federal courts under 28 U.S.C. § 1334 and, until
13 the matter is removed, jurisdiction rests with the state court
14 and does not attach to the federal court. The state court, it
15 therefore follows, has sole jurisdiction over the substantive
16 issues and the merit of any defenses (including violation of the
17 automatic stay of the Bankruptcy Code or that the debts in
18 question are subject to discharge in bankruptcy). Defendant's
19 argument might have merit if Jeffries were the final word on the
20 matter. However, since that opinion was released, there have been
21 further developments in the area in the Ninth Circuit.

22 In In re Gruntz, 202 F.3d 1074, 1082 (9th Cir. 2000), the
23 Court of Appeals held that "[t]he automatic stay is an injunction
24 issuing from the authority of the bankruptcy court, and
25 bankruptcy court orders are not subject to collateral attack in
26 other courts." [internal citations omitted]. Moreover, "[a]ny

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1 state court modification of the automatic stay would constitute
2 an unauthorized infringement upon the bankruptcy court's
3 jurisdiction to enforce the stay. . . . Because of the bankruptcy
4 court's plenary power over core proceedings, the . . . argument
5 that states have concurrent jurisdiction over the automatic stay
6 under 28 U.S.C. § 1334(b) is unavailing." Id. at 1082-83. A
7 state court thus lacks jurisdiction in the first instance to
8 determine whether a particular action of a defendant violated or
9 violates the automatic stay of the bankruptcy court. That
10 jurisdiction resides exclusively with the bankruptcy court.

11 B. Violation of the Automatic Stay

12 Defendant in his Concise Statement of Material Facts, filed
13 with his Motion for Summary Judgment, lists the following
14 pertinent facts (supported by affidavits of the Defendant and the
15 Defendant's attorney, and by copies of documentary evidence):

16 (1) Defendant filed the action in state court on February 1,
17 2008 which, among other items, asked the court to hold Debtor in
18 contempt for failing to pay attorney fees which had been entered
19 against him in a previous proceeding.

20 (2) At the time Defendant filed the state court action, he
21 was unaware that Debtor had filed bankruptcy.

22 (3) Defendant does not recall learning of Debtor's
23 bankruptcy filing until February 22, 2008, when he received an
24 envelope from Debtor containing a copy of the original notice of
25 Debtor's bankruptcy issued by the court on April 30, 2007.

26 (4) To the best of Defendant's recollection, at about the

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1 same time he received the notice of Debtor's bankruptcy filing,
2 his client Preboski dropped off at his office the same notice she
3 had received from the Debtor.

4 (5) To the best of Defendant's knowledge, Preboski did not
5 learn of the bankruptcy filing until receiving the Notice of
6 Filing at the time he received it.

7 (6) On March 2, 2008, Defendant received from the bankruptcy
8 court a copy of an order returning documents to the Debtor.
9 Before receiving this notice, the Defendant had received nothing
10 from the bankruptcy court concerning Debtor's bankruptcy.

11 In response to the Defendant's motion for summary judgment,
12 the Plaintiff submitted his affidavit in which he submits:

13 (1) There is a genuine issue of material fact.

14 (2) Defendant should have had knowledge of the Plaintiff's
15 bankruptcy filing as he is an experienced litigator and would
16 have learned of the filing as part of due diligence in the
17 representation of his client.

18 (3) Defendant continued to pursue legal action against the
19 Plaintiff in state court for 65 days after the date that
20 Defendant states he learned of the bankruptcy filing.

21 (4) Defendant willfully withheld discovery materials in the
22 state court proceeding in an attempt to conceal his prior
23 knowledge of Plaintiff's bankruptcy filing.

24 (5) Defendant's affidavit filed with his motion for summary
25 judgment in this court is disingenuous and misleading.

26 In a Reply to Plaintiff's Response, Defendant states that

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1 once he learned of Debtor's bankruptcy he took no action to
2 recover for Preboski any debts discharged in Plaintiff's
3 bankruptcy. Copies of two documents were filed with the Reply.
4 Defendant's client Preboski filed a Response on April 30, 2008,
5 over Defendant's signature, to Plaintiff's motion to dismiss the
6 state action, by which she stated that she had no objection to
7 dismissal of that part of the action regarding attorney fees,
8 since she had become informed of Plaintiff's bankruptcy filing. A
9 copy of Plaintiff's motion to dismiss was also tendered which
10 shows that it was denied on May 14, 2008.

11 Analysis

12 Neither the Defendant nor his client Preboski were listed in
13 the Debtor's schedules filed with his bankruptcy petition. The
14 Notice of Filing issued by the bankruptcy court on May 2, 2007
15 was not mailed to either party. It was not until February 25,
16 2008, when the Debtor filed an amended Schedule F and an Amended
17 Mailing Matrix, that the Defendant and Preboski were on the
18 court's list of creditors. Presumably, the Debtor mailed copies
19 of the Notice of Filing to the two omitted creditors just prior
20 to filing amended schedules with the court. This is consistent
21 with Defendant's statement that neither he nor his client were
22 aware of the bankruptcy filing until the February 22, 2008
23 receipt of the copy of the Notice of Filing which had been sent
24 by the Debtor.

25 Plaintiff argues that the Defendant should have been aware
26 of his bankruptcy filing, as he is an experienced litigator.

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1 However, the Court will not impose on the Defendant the duty to
2 search the bankruptcy records for a filing by the Plaintiff,
3 especially when the Plaintiff had the duty under the Bankruptcy
4 Code to list all creditors with his initial filing. Plaintiff
5 provides no other evidence as to actual knowledge of the filing
6 before February 22, 2008. Accordingly, for purposes of
7 Defendant's motion, the Court accepts February 22, 2008 as the
8 date that Defendant obtained knowledge of the Plaintiff's
9 bankruptcy filing.

10 Plaintiff states in his affidavit that the Defendant
11 continued to pursue legal action in state court for 65 days after
12 February 22, 2008. He does not, however, present any evidence or
13 facts showing that Defendant took any affirmative measures to
14 collect the debt subject to discharge. Nor does he present any
15 evidence that any party acting for the Defendant or the state
16 court itself took any actions in furtherance of the state court
17 action pertaining to the debt. Defendant, on the other hand,
18 states that he took no actions to collect the disputed debt once
19 he learned of the bankruptcy filing and presented documentary
20 evidence showing that his client informed the state court on
21 April 30, 2008 that she had no objection to dismissal of that
22 portion of her action pertaining to her claim for attorney fees,
23 as she had learned that the Plaintiff had filed for bankruptcy.
24 Accordingly, as Plaintiff has presented no "affirmative evidence"
25 that Defendant took any actions in violation of the automatic
26 stay after he learned of Plaintiff's bankruptcy filing, this

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1 Court will not award any contempt sanctions under Code § 105 for
2 violation of the automatic stay.

3 C. Federal Debt Collection Practices Act (FDCPA).

4 As stated previously, the Plaintiff suggests no violations
5 of the FDCPA other than collection of a debt in violation of the
6 Bankruptcy Code's automatic stay. Because the Bankruptcy Code
7 provides the exclusive remedy for violation of both the automatic
8 stay and the discharge injunction of §524, a claim under the
9 FDCPA based entirely on a violation of either of those provisions
10 is barred. Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th
11 Cir. 2002). Accordingly, Plaintiff's claim for damages under the
12 FDCPA must fail.

13 CONCLUSION

14 Defendant has submitted sufficient evidence, not rebutted by
15 the Plaintiff, showing that Defendant was not timely notified of
16 Plaintiff's bankruptcy filing and was thus unaware that the
17 actions he took in state court could have violated the Code § 362
18 automatic stay which went into effect when Plaintiff filed his
19 petition in bankruptcy. As that is an element the Plaintiff must
20 prove before this court will award civil sanctions for violation
21 of the automatic stay, Plaintiff's claim for violation of § 362
22 must fail. Because the Bankruptcy Code provides the exclusive
23 remedy for violation of the automatic stay, Plaintiff's claim
24 under the FDCPA must also fail.

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Accordingly, Defendant's motion for summary judgment will be granted. An order consistent with this Memorandum Opinion will be entered by the court.

F. H. Hays

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